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NO. 93-1596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA,
Petitioner,
v.
DARRYL TRAVIS WATKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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COMES NOW DARRYL TRAVIS WATKINS, who respectfully files the following opposition to the State of Alabama's *Petition for a Writ of Certiorari to the Supreme Court of Alabama* (hereinafter *"Petition"*).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alabama Court of Criminal Appeals has granted Darryl Watkins post-conviction relief from his capital conviction and death sentence. That relief arises from the ineffectiveness of

Mr. Watkins' 1987 appellate counsel.

Mr. Watkins, a young black man, was convicted and sentenced to death for the robbery-murder of an elderly white man in Birmingham. This Court, however, decided Batson v. Kentucky, 476 U.S. 79 (1986), while Mr. Watkins was on direct appeal. And that decision gave Mr. Watkins potentially invincible grounds for reversal. For, at trial, the prosecution had peremptorily struck at least twelve of thirteen African-American venirepersons.

Nonetheless, Watkins' Batson claim failed. It failed because appellate counsel neglected to supplement the record which, as originally composed and transmitted, did not reflect the prosecution's apparently discriminatory strikes.

This unreasonable neglect, the Alabama Court of Criminal Appeals has held, entitles Mr. Watkins to a new trial, unless the State of Alabama, on remand to the trial court, can provide race-neutral reasons for its strikes.

The State of Alabama has now petitioned this Court for a writ of certiorari. It proffers this single *question presented*: "[W]hether counsel rendered ineffective assistance when he failed to move to supplement the record in 1987 with information about the racial composition of the 1982 venire and the race of the jurors struck, **even though that information only became necessary after 1987, as a result of the subsequent developments in Batson law.**" *Petition* at 10 (emphasis added). Because neither the record

nor the decision below present this question, the State's petition should be denied.

More fully, the Petitioner contends that Strickland v. Washington, 466 U.S. 668 (1984), was misapplied: By deeming appellate counsel deficient for not supplementing the record to reflect the district attorney's peremptory strikes, the Court of Criminal Appeals effectively required appellate counsel "to predict the future development of the law in order to provide effective assistance". *Petition* at 11. The "Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law"; the state appeals court "condemn[ed] counsel for his inability to predict the substantial development in Batson law". *Petition* at 17; 19-20.

In reality, Strickland properly controlled below, and the Court of Criminal Appeals did not impose any prognosticatory duties on appellate counsel. Reasonably effective appellate counsel was only expected to know one thing: A Batson claim could not succeed without some basic evidence in the record pertaining to the state's striking of black venirepersons. As shown below, reasonable notice of this fact was abundant in 1987.

Such notice abounded from state appellate rules, appellate advocacy treatises, Batson itself, and Batson's state law progeny. It even sprang forth from the pages of the 1987 supplemental

briefing which the current Petitioner submitted to the Alabama Supreme Court.

WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The Court of Criminal Appeals held appellate counsel was ineffective when he raised a claim under Batson v. Kentucky, 476 U.S. 79 (1986), but failed to supplement the record to reflect the prosecutor's discriminatory use of peremptory challenges. Watkins v. State, slip op. at 7-12;19; *Petitioner's Appendix A,* pp. 9-15; 29-30.

Petitioner contends the Court of Criminal Appeals thereby twisted Strickland and ascribed to appellate counsel a duty to discern the shape of case law to come. The Court of Criminal Appeals, argues the Petitioner, imposed on Watkins' appellate lawyer an obligation "to present claims based on how the law may develop", since the "information [on racially-skewed challenges exercised by the state] only became necessary after 1987, as a result of the subsequent development in Batson law". *Petition* at 10;ii. This is nonsense, frivolous nonsense.

A. Appellate Counsel's Performance Below: Making A Claim Without Facts; Baking A Cake Without Ingredients

Batson v. Kentucky, 476 U.S. 79 (1986), was decided in April 1986, while Darryl Watkins' remained on direct appeal. Still, appellate counsel's November 1986 brief-in-main to the Alabama Supreme Court made no reference to Batson or to racially-skewed use of peremptory challenges. (Supp.H.000504)[1] Not until the February 1987 filing of his reply brief did appellate counsel argue Batson as a grounds for reversal. (Supp.H.000529)

Most importantly, even then, the Batson argument was pure law with no fact, an assertion of constitutional wrong completely unsupported by citation to the record:

> Since the submission of the original brief in this cause, recent cases from this Court and the United States Supreme Court make it necessary to raise another issue at this time, under the plain error rule. The cases referred to are Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986) and Ex parte Jackson, (84-1112, December 19, 1986).
>
> The appellant now contends that his equal protection rights were violated when the prosecution used its peremptory challenges to strike black jurors from the venire. The appellant is black and the victim was white.
>
> The criteria set out in Batson v. Kentucky, supra, provides that to establish a prima facie case of discrimination the appellant must show the following:

---

[1] "Supp.H. ____" refers to pages of the supplemental record compiled in, and generated by, the state post-conviction proceedings.

(1)The appellant is a member of "a cognizable racial group" and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."

(2)That "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (This element is a given).

(3)That the prosecutor excluded veniremen from the jury on the basis of their race.

> The appellant argues that he has presented a prima facie case of discrimination, in that he is black and blacks were struck from the venire by the prosecutor's use of peremptory challenges.
>
> Appellant is aware that this issue has not been presented previously, but under the plain error exception to rule 39(k), A.R.A.P., the appellant would request that this Court review the issue since it has "adversely affected the substantial rights of the petitioner.

(Supp.H.000529)

Neither the race of the venirepersons nor the identities of those struck by the district attorney were cited, because neither had been added to the record. Notwithstanding personal knowledge of the discrimination which had tainted jury selection, appellate counsel -- who had personally tried the case in circuit court -- failed to provide the Alabama Supreme Court with the factual record which would have ensured Batson relief.

(H.000112)[2]

Appellate counsel, to be more concrete, made no use of the procedural mechanism specifically designed for "correction or modification of the record...to conform to the truth". He did not employ Alabama Rule of Appellate Procedure 10(f) to effect the supplementation of the record necessary to protect his client.

Did this performance reflect the competent advocacy demanded, under Strickland, by the Sixth Amendment? Overlooking even appellate counsel's inexplicable failure to raise Batson in his November 1986 main brief, the Petitioner heaps praise on appellate counsel:

> Counsel not only raised a new issue based on a case decided four years after trial, he did so **in language that virtually paralleled the language used by this Court in the Batson decision.** Counsel's actions at that time were reasonable and, in fact, he succeeded in obtaining plain error review by the Alabama Supreme Court. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987). This does not support a finding of ineffective assistance of counsel.

Petition at 13 (footnote omitted; emphasis added).

Of course, just as the mere recounting of a recipe does not make a cake, the simple recitation of how to prove a claim does not, in fact, prove it. A cake requires ingredients. And a

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[2] "H. ___" refers to pages of the main record compiled in, and generated by, the state post-conviction proceedings.

claim requires facts, evidence off which the argument is leveraged.

Unfortunately, appellate counsel, in his 1987 reply brief, never went beyond baldly asserting "blacks were struck from the venire by the prosecutor's use of peremptory challenges". (Supp.H.000529) Plainly, such hazy invocation of alleged facts outside the record enjoyed no legal weight under the law of Alabama. Webb v. State, 565 So.2d 1259 (Ala.Cr.App. 1990). Under these circumstances, Batson defeat was ensured.

The Petitioner, of course, presently contends we know this today only through case law developments subsequent to appellate counsel's 1987 labors:

> In holding that trial counsel's performance was deficient because he failed to put forth the "necessary Batson information" when no court had yet determined what information was necessary, Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law. This decision is irreconcilable with established precedent.

Petition at 17.

To be sure, somewhere, some court has probably allowed hindsight to creep into its Strickland analysis. That, however, is not what happened in the Alabama Court of Criminal Appeals.

As amply demonstrated below, appellate counsel, brief-writing back in 1987, was on both general and specific notice as to the fatal flaw in his Batson argument. Reasonably, he should

have known both that a winning legal claim, invariably, must be anchored in fact and that Batson, in specific, demanded certain particular factual showings. Appellate counsel's failure to heed such notice placed him beyond the Sixth Amendment pale.

B. Alabama's Rules Of Appellate Procedure As A Contemporaneous Source Of General Notice In 1987

Rule 28 of the Alabama Rules of Appellate Procedure still makes clear -- just as it did in 1987 -- the role of the factual record in an appellate brief. Initially, it identifies the need for an appellant to provide "a full statement of the facts relevant to the issues presented for review, with appropriate references to the record". *ARAP 28(a)(4)* (parenthetical omitted).

More critically, it goes on to specify the necessity for argument and prescribes the basic formula such argument must follow:

> The brief of the appellant shall contain under appropriate headings and in the order here indicated: [*inter alia*] An argument (The argument may be preceded by a summary. The argument **shall contain** the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes **and parts of the record relied on**)...

ARAP 28(a), 28(a)(5) (emphasis added).

Finally, Rule 28 dictates, *inter alia*, "References in the briefs to the record on appeal **shall be** to the appropriate page numbers of the record on appeal..." *ARAP 28(e)*.

In short, the Alabama Rules of Appellate Procedure leave no room today -- and left no room in 1987 -- to doubt what is demanded of appellate counsel to prevail. Now, as in 1987, they plainly apprise appellate counsel of the need to factually ground his Batson argument, or any other claim for relief.

C. Professional Literature on Appellate Advocacy As A Contemporaneous Source Of General Notice In 1987

In 1951, United States Supreme Court Justice Robert Jackson, writing in the American Bar Association Journal, made a compellingly common sensical observation: "The purpose of a[n appellate] hearing is that the Court may learn what it does not know, and it knows least about the facts". 37 ABA J 801, 803 (1951).

Even without the guidance of our state appellate rules, appellate counsel should have been on notice as to the centrality of factual evidence in an appellate brief. Any number of appellate advocacy treatises available to appellate counsel in 1987 echoed Justice Jackson and stressed the overwhelming importance of the factual record.

In his book Appellate Practice in the United States

(1981), for instance, Robert Stern warned that:

> To regard the Statement [of Facts] as the factual part of the brief and the Argument as the legal section is, however, only a half-truth and a dangerous one. For factual issues are **argued** in the Argument, not the Statement. In many cases the only issues or the most important issues are factual.

Stern, p. 281.

Stern further reminded his readers that, most certainly, "[r]eferences to the facts are always to be supported by appropriate record references", that "[w]hen a fact in the record is referred to in the Argument, the record reference is to be cited...". Stern, pp. 272;281.

An ABA volume, also published in 1981, provided the same lessons: "A good theory of the case has a good factual foundation in the factual record." And "[a]ll the facts included [in argument] must be supported by the record and should not be overstated." Carre, Ntephe and Trainor, eds., ABA Appellate Advocacy (1981), pp. 101;110.

Available to appellate counsel in 1987, too, was an appellate advocacy text used in law schools across the country: Wiener's Effective Appellate Advocacy. Wiener made unmistakably plain the need to construct appellate argument carefully and accurately around facts discernable from the record. For argument, "[b]asically, three steps are necessary: First you

D. Batson Itself, Commentary, And Case Law As Contemporaneous Sources Of Specific Notice

Assuming for the moment that appellate counsel was unaware of the general requirement that legal arguments have factual roots, the specific case law he relied on should have so informed him.

1. Batson v. Kentucky

This Court ruled in Batson v. Kentucky, 476 U.S. 79 (1986), that a prosecutor's racist use of preemptory challenges was susceptible to being proven and remedied even in the context of a single trial. The Court, however, made perfectly clear that a remedy could not be won with mere allegation or legal incantation. Rather, a defendant must make a factual showing based on actual evidence in the record:

> (D)efendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely **on evidence** concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the **defendant first must show** that he is a member of a cognizable racial group ... and [**also show**] that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, **the defendant must show** that these facts and any other relevant circumstances raise an

> inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raise the necessary inference of purposeful discrimination.

Id. at 96(emphasis added).

Reasonably effective counsel citing Batson v. Kentucky would have fully and thoroughly read Batson v. Kentucky. He then would have known Batson to demand factual showings.

2. The Alabama Lawyer

Batson was not kept a secret in our local legal community. *The Alabama Lawyer*, in its July 1986 issue, featured Batson as the first entry in its "Recent Decision's of the Supreme Court of the United States" section. The synoptic treatment of Batson ran almost two full columns. More to the point, it repeatedly specified that which a defendant "must show", as well the procedure following a "*prima facie* showing". *The Alabama Lawyer*, July 1986, at 216-17.

3. Ex parte Jackson

Appellate counsel, in addition to citing Batson in his reply brief, also cited to Ex parte Jackson, 516 So.2d 768 (Ala. 1986). (Supp.H.000532)

This made even more unreasonable appellate counsel's

having ignored the factual predicate required for Batson relief. Ex parte Jackson excerpted from Batson the precise language which outlines a defendant's factual burden. 516 So.2d at 772-73. It also detailed, especially in Justice J. Gorman Houston's concurring opinion, the exact facts allowing for Batson's favorable application. Id.

E. The Attorney General's Office As A Contemporaneous Source of Specific Notice

Last, if appellate counsel did not know he needed Batson facts to make a Batson claim when he first raised Batson in his 1987 reply brief, he sure knew it when he received the Attorney General's special supplemental brief.

The Attorney General, after receiving appellate counsel's 1987 reply brief, moved for -- and received -- permission to respond. (Supp.H.000112) In that response, the Attorney General focused exclusively on the absolute dearth of evidence concerning the state's striking of black persons:

> This case is markedly different from Batson and Jackson in that there is nothing in this record to suggest that a prima facie case could be established ... The case, therefore, fails utterly to meet part of the first requirement of Batson, that the prosecutors have struck members of the defendant's race from the jury.

1987 Brief and Argument in Reply to Petitioner's Response at 3(footnote omitted).

Perhaps more to the point: "The defendant cannot argue that error is plain or obvious where there is no indication in the record that the act on which the error is predicated -- the striking of blacks by the State -- ever occurred". *1987 Brief and Argument in Reply to Petitioner's Response* at 4.

Appellate counsel, even after reading this, did nothing to cure the deficient record before the Alabama Supreme Court rendered its decision. (R.000112)

F. In Sum

Appellate counsel, as shown, had every reason to know merely crying Batson on a still barren record would fail. He had no reason to ignore the need to move for supplementation under Alabama Rule of Appellate Procedure 10(f). There was nothing to lose by making such a motion and no way to win without making it.

More, Petitioner does not even contest that such a motion would assuredly have enjoyed more than a reasonable probability of success.

Counsel did not fail for want of notice or precognitive ability. He failed for want of care.[3] He did not "support his

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[3]It might be noted that Mr. Watkins' direct capital appeal does not represent the only time his 1987 appellate counsel, J. Louis Wilkinson, fell outside the bounds of adequate representation. *See* Mylar a/k/a Miles v. Wilkinson, 435 So.2d 1237 (where Mr. Wilkinson is named as the appellate lawyer found ineffective in Mylar v. State of Alabama, 671 F.2d 1299 (11th Cir. 1982)). *Cf.* Clarke v. State , 583 So.2d 631, 632-33 (Ala. 1991)(where Mr. WIlkinson failed to comply with Alabama Rule of

client's appeal to the best of his ability". Anders v. California, 386 US 738, 744 (1967).

CONCLUSION

Wherefore, Mr. Watkins respectfully submits that it would be improvident to grant certiorari in this case.

Respectfully submitted,

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Appellate Procedure 39(k) and thus forewent consideration of challenge to search warrant).